



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: **SEP 10 2014**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on December 12, 2011. The petitioner filed a subsequent appeal. On December 11, 2012, the Administrative Appeals Office (AAO) remanded the matter to the director. The matter is now before the AAO on certification pursuant to 8 C.F.R. § 103.4. The director's decision will be affirmed.

The petitioner seeks classification on behalf of the beneficiary as an "alien of extraordinary ability" in athletics, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established that the beneficiary qualifies for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the beneficiary's basic eligibility requirements.

The director certified the matter to the AAO and advised the petitioner that she could submit a brief to us within 30 days pursuant to the regulation at 8 C.F.R. § 103.4(a)(2). The petitioner did not submit any additional statement or evidence. The director also noted that the petitioner failed to respond to a November 3, 2013 request for evidence. On July 2, 2014, we sent a copy of the certification to the petitioner's counsel and have not received a response. For the reasons discussed below, we uphold the director's ultimate conclusion that the petitioner has not established the beneficiary's eligibility for the exclusive classification sought.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, we will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. ANALYSIS

A. Translations

As stated by the director in his decision, the record of proceeding reflects that the petitioner submitted numerous foreign language documents without any English language translations. The regulation at 8 C.F.R. § 103.2(b) provides in pertinent part:

(3) *Translations.* Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As cited above, the regulation at 8 C.F.R. § 103.2(b)(3) specifically requires that any foreign language document that is submitted to USCIS must be accompanied by a full and certified English language translation. The petitioner did not comply with the regulation at 8 C.F.R. §103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

B. The Beneficiary's Field

Although the director is correct that the Form I-140, Immigrant Petition for Alien Worker, lists the beneficiary's occupation as a trainer, the provided job description and letter of support both indicate that the beneficiary would be competing, as well as working as a trainer.

C. Evidentiary Criteria²

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

As stated by the director in his decision, the petitioner submitted numerous photographs of medals and trophies with captions. While the medals and trophies identify the events, they do not reflect that they were awarded to the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the *alien's receipt* [emphasis added]," submitting photographs of medals or trophies that do not indicate the recipient is insufficient to demonstrate that the beneficiary actually garnered the medals or trophies.

The director also found that the few awards which list the beneficiary's name are not in English and lack a certified translation. As previously stated, these awards have no probative value. Finally, the

² The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

director found that the record did not contain “any documentation explaining or establishing the national or international reputation of these awards.”

As the petitioner failed to respond to the director’s request for evidence or submit additional evidence on certification, the record supports the director’s finding that the petitioner has not established that the beneficiary meets this criterion.

Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The director concluded that the petitioner did not submit qualifying evidence on behalf of the beneficiary under 8 C.F.R. § 204.5(h)(3)(ii). Regarding the beneficiary’s membership in the [REDACTED] Union, the director found that the record does not contain any evidence that the association requires outstanding achievements of its members, as judged by recognized national or international experts. The record also contained additional documents purported to relate to this criterion, but, as stated by the director, the record does not contain the required certified translations. Finally, as stated by the director, a certificate of participation in a championship “does not appear to establish membership in an organization.”

As the petitioner failed to respond to the director’s request for evidence or submit additional evidence on certification, the record supports the director’s finding that the petitioner has not established that the beneficiary meets this criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

As stated by the director and discussed above, without certified English translations, the evidence submitted under this criterion has no probative value. Moreover, the petitioner did not submit circulation or distribution data for the publications.

As the petitioner failed to respond to the director’s request for evidence or submit additional evidence on certification, the record supports the director’s finding that the petitioner has not established that the beneficiary meets this criterion.

Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases

Although not addressed by the director in his decision, the petitioner asserted on appeal that the beneficiary “display[ed] her work in a showcase through participation in these tournaments.” The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vii), however, requires “[e]vidence of the display of the alien’s work in the field at artistic exhibitions or showcases.” The beneficiary is a karate competitor/trainer. Participating in a tournament is not the same as a painter’s or sculptor’s work being on display in a gallery or museum. The interpretation that 8 C.F.R. § 204.5(h)(3)(vii) is

limited to the visual arts is longstanding and has been upheld by a federal district court and is not an abuse of discretion. *See Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding an interpretation that performances by a performing artist do not fall under 8 C.F.R. § 204.5(h)(3)(vii)). The ten criteria in the regulations are designed to cover different areas; not every criterion will apply to every occupation. As the beneficiary is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases, the petitioner has not submitted qualifying evidence that the beneficiary meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(vii).

D. Summary

As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to demonstrate that the beneficiary satisfies the antecedent regulatory requirement of three types of evidence.

III. CONCLUSION

Had the petitioner submitted the requisite evidence on behalf of the beneficiary under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor” and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While we conclude that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, we need not explain that conclusion in a final merits determination.³ Rather, the proper conclusion is that the petitioner failed to demonstrate that the beneficiary has satisfied the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

The petitioner has not established the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The decision of the director denying the petition will be affirmed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

³ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

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NON-PRECEDENT DECISION

Page 7

ORDER: The decision of the director is affirmed. The petition is denied.